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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL TAXPAYERS LEGAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

and

BRIEF OF THE NATIONAL TAXPAYERS LEGAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The National Taxpayers Legal Fund, Inc., respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support whereof, it states:

1. The National Taxpayers Legal Fund, Inc., (Taxpayers Fund[1]) is a 501(c)(3) charity. It was established in 1973 to advance the interests of taxpayers in the conduct, according to

[1] (This footnote omitted.)

law and due process, of the federal taxing and appropriations mechanisms. To that end, it has provided testimony on legislation and regulations, pursuant to IRS regulations, from its Chairman, former Senator Eugene J. McCarthy, and has intervened in selected cases of general importance.[2]

2. Specifically concerning the appropriations processes, Taxpayers Fund is interested in the effectiveness of Congressional oversight of the spending of government funds. It has expertise and interest in the effect of this decision on the ability of Congress to obtain accurate and complete information necessary to carry out the appropriations process.

3. Whether a President should have absolute or qualified immunity in cases such as this one will have permanent and major impact on the relationship between the President and the Congress, and on the ability of each to carry out their duties under the Constitution. Taxpayers Fund will address primarily the effect on Congress and will not duplicate briefs heretofore filed.

4. Counsel for Taxpayers Fund has obtained consent for the filing of this brief from counsel for Respondent, and from counsel for Petitioners Harlow and Butterfield. Counsel for Petitioner Nixon stated that he neither consents to, nor opposes, the filing of this brief. Therefore, this Motion is necessary.

For the foregoing reasons, The National Taxpayers Legal Fund, Inc., respectfully submits that its Motion for Leave to File the Annexed *Amicus Curiae* Brief, should be granted.

Respectfully submitted,

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[2] For the record, Taxpayers Fund notes that Ernest Fitzgerald is one of its six Board Members, but he removed himself from any consideration of the decision to file this brief.

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INTEREST OF AMICUS

The National Taxpayers Legal Fund, Inc. (Taxpayers Fund) is a 501(c)(3) charity, established as a non-profit organization. Taxpayers Fund is supported entirely by public donations, and is dedicated to the legal advocacy of the interests of taxpayers in both the taxing and appropriations processes. It becomes involved only in those cases which have substantial general impact, and views the instant case in that light.

Specifically, it believes that the present case will have major, long-term impact on the relationship between the Presidency and the Congress, and especially on the ability of Congress to obtain full and accurate information in conducting its oversight of the use of appropriations. This, in turn, has an indirect effect on all taxpayers.

It views the question of whether the President should have absolute or qualified immunity in this civil case as critical to that future capacity of Congress.

SUMMARY OF ARGUMENT

Taxpayers Fund submits that a President should have qualified immunity from a civil suit such as this one, under the standards laid down in the *Butz* case, recognizing the difference in application that occurs when a President, rather than a Cabinet-level official, is involved. It acknowledges that such a conclusion may cause certain practical difficulties which would apply to future cases, but do not apply to this one. If such difficulties arise, they can be prevented by appropriate legislative or judicial controls. And Taxpayers Fund submits that this conclusion is compelled not just by considerations of the powers and duties of the Presidency, but also by the powers and duties of the Congress, which are necessarily involved in this case, and which will be involved in future ones.

The Constitution gives express powers to Congress to raise funds through taxation, and to spend them through appropriations. Unless Congress has accurate knowledge of the ways that the billions of dollars it has authorized, are being spent, its Constitutional power of appropriations is rendered ineffective. For that reason, a President cannot interfere deliberately and knowingly with a witness before Congress. Accordingly, the Petitioners here cannot have absolute immunity from the Respondent in a civil case. The proper conduct of public business requires this result.

Other procedural and factual issues are raised in the case, but are fully addressed by the parties and by other briefs, and will not be discussed by Taxpayers Fund. Among the other

issues, the *amicus* will address only the question of whether the Civil Service remedies constitute full redress, to the extent that the issue bears on Congressional ability to oversee appropriations.

ARGUMENT

I. THE DECISION BETWEEN ABSOLUTE AND QUALIFIED IMMUNITY IN THIS CASE WILL AFFECT FUTURE PRESIDENTS AND FUTURE CONGRESSES, ESPECIALLY THE DUTY OF CONGRESS TO INITIATE AND APPROVE APPROPRIATIONS, AND TO OVERSEE THE SPENDING OF FUNDS ONCE APPROPRIATED. FOR THAT REASON, AMONG OTHERS, THE PRESIDENT SHOULD BE AFFORDED QUALIFIED IMMUNITY.

The Petitioners have presented this case to the Court as if it concerned only the civil liability of them to the Respondent, a "middle-ranked Defense Department official" who was dissatisfied with his termination. Taxpayers Fund submits that much more is involved, that the case affects the Constitutional balance of powers.

From Plato's *The Republic,* through Machiavelli's *The Prince,* the basic theory of government was that the leader of any nation had legitimate authority to do what he chose, using his sole determination of what was best for the citizens of that nation. To Machiavelli, and those who share his viewpoint today, governance is a matter only of the pragmatic use of this power. But to another group of philosophers, ideological descendants of the Greeks and Romans, and including the Framers of our Constitution, there was a deeper question. It was stated by the Roman poet, thusly: "*Quis custodiet ipsos custodes?*" *(Juvenal, VI,* p. 347.)

Even under the theories of democracy as they existed prior to 1787, it was possible for the legislative body to cede all power to the leader of a nation, and then for that leader to function with no effective limits on his power other than the

pragmatic ones of which Machiavelli wrote. This is not possible under a Constitutional government such as ours. The definition of the government by its Constitution is more basic than any specific actions of its office-holders in any branch of the government, including the President. *Youngstown Sheet and Tube* v. *Sawyer,* 343 US 579 (1952). Although the Framers intended that our office-holders be the first guardians of our freedom, the Constitution itself is the guardian of the guardians.

A. This Case Concerns More than the Weighing of The Rights of an Individual Against a President Who May Have Harmed Him. Of Necessity, it Involves the Balance of Powers Between Any President and Any Congress.

This specific case concerns the revelation and testimony under oath before Congress by the Respondent of a $2 billion overrun in the cost of the C-5A airplane, and his subsequent firing by the Respondent(s). It is the possibility of the repetition of such events in the future, and the effect of the decision in this case on the President and the Congress at such future times, that is the concern of Taxpayers Fund in the present case.

The Petitioners in their briefs make passing reference to the system of checks and balances as established in our Constitution, but discuss them in detail only as they concern the powers of the President, and as if a decision in this case against them would cause the courts to interfere improperly in the functioning of the Executive Department. Taxpayers Fund submits that this is the correct fundamental question, but the wrong aspect of it. No reference is made to the specific powers of Congress. And those are the key to the decision in this case, and its future import.

After naming, describing and specifying the organization of the Senate and the House of Representatives, the very first specific legislative power that is mentioned and provided in the Constitution reads as follows: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

(Art. I, § 7, ¶ 1.) In the *Federalist,* the Founding Fathers explained that the power to tax was vested initially in the House because that body by its larger numbers and its direct and more frequent elections was closer to direct control by the people than any other official or organ of government. (*Federalist,* # 35.)

Once funds had been raised by taxes duly imposed, they could be spent for any purpose within the reach of the powers of Congress. (See Art. I, § 8, generally.) This could be done only by means of appropriations, passed by Congress and signed by the President. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law. . . ." (Art. I, § 9, ¶ 7.)

As explained in the *Federalist,* this provision was designed to give control to Congress generally as the direct representatives of the people (the House) and of the States (the Senate) over the spending of the funds of the federal government. There was one exception stated, the veto power of the President, and one exception implied, the review of Constitutionality of legislation by this Court. (See *Federalist,* # 47.)

While the election of Senators has since become a matter of popular vote rather than selection by the legislatures of the several States (Amendment 17), the basic pattern of the raising and spending of funds as established by the Constitution remains unchanged.

B. It is Not Just Logic, but Actual Experience of The Executive Department, as Found by That Department, Which Makes this a Case of Substantial, Long-Term Importance.

Taxpayers Fund now fits the instant case into that framework. Respondent was an employee of, and a member of, the Executive Department of the government. The terms of his employment there, however, were governed by laws enacted by Congress. (The question of available Civil Service remedies, their use, and their effect *vel non* on this case are discussed below.) It should be noted that the definition of the terms of

employment of all Executive Branch employees rests with Congress, with one single exception: Congress may not reduce the salary of the President while he is in office. (Art. II, § 1, ¶ 7.)

It is a matter of courtesy, not Constitutional requirements, that historically the President has been allowed to determine the composition and salaries of the White House staff, and Congress has been allowed to determine the composition and salaries of its various supporting staffs, without opposition from the other. As to the balance of the Executive Department, now consisting of almost 3 million civilian employees, their numbers, powers, duties and compensation have often been hotly contested between the President and the Congress.

Under the Constitutional scheme, all employees of the Executive Department bear a master-servant relationship to the President, though with the coming of Civil Service, which began under President Chester Arthur, they do not serve at the will of the President. The only exception to this pattern is the General Accounting Office, which is employed by, and reports only to the Congress. (31 U.S.C. § 41.)

However, for Congress to exercise its powers to raise funds through taxes, and to spend them through appropriations, it must have accurate information on how the Executive Department is functioning in both areas. Its source of such information is to have various members of the Executive Department testify before the various Committees and Subcommittees of Congress. The power of these Committees to subpoena all such employees (with the possible exception of the President only) to testify on all relevant matters has been established and recognized as concomitant to the power to legislate, from the beginnings of the Republic. (See 2 U.S.C. § 190-194.)

Taxpayers Fund emphasizes the essential nature of the information-gathering process to the ability of Congress to carry out its Constitutional duties. If Congress cannot obtain full and accurate information from Executive Department employees who testify before it, then it is put in the position of the Board of Directors of a corporation, having almost 3 million

employees, who can only obtain reliable information on the operations of the business by contacting the outside accountants, which is roughly the position of the GAO. In short, such an inhibition of information from the normal sources prevents Congress to that extent from carrying out its Constitutional duties.

As the case of the Respondent demonstrates, this pattern of being employees of the Executive Department, but being called upon to testify to Congress, creates a conflict of interest. The most succinct description of that conflict is, "No man can serve two masters." (*Matthew 6:24.*) It can be expected that in the future, as in the instant case, there will be times when the Executive Department may not want certain information to reach the Congress. On the other hand, Congress may summon and require the testimony of the person who has that information. What, then, is the duty of that individual?

The obligation of the individual is to testify honestly. The obligation of all others is to refrain from interfering with that testimony. Such interference is a crime, punishable by five years in prison and/or a $5,000 fine for any person to interfere, or seek to interfere with the testimony of any individual before any Committee or Subcommittee of Congress. (18 U.S.C. § 1505.) No exceptions are stated in the law for the person who is testifying, nor for the person who so interferes.

Respondent testified several times before Congress, including on the $2 billion overrun of the C-5A. His testimony was protected. If the subsequent facts are as he alleges, then the actions of the Petitioners were illegal.

But this case is civil, not criminal, and Taxpayers Fund submits that the basic question is the effect that the present outcome will have on the willingness of Executive Department employees in the future to testify fully and accurately to Congress concerning the operations of their various Departments and Agencies.

While the legal theory is that all such witnesses will testify fully and honestly, the theory may fail in practice. The transcripts in this case suggest that Respondent was terminated

for not being a "team player." This suggests that the favored behavior of a civil servant is to raise his concerns through channels, within the family. It also suggests that it is a greater evil to make public a difference of opinion, even when commanded by Congress to do so, than it is to go through channels.

As a practical matter, silence of government employees who know of abuses of power, and misuses of government money, is unfortunately widespread. This has been recently confirmed by the Executive Department itself, in a study performed by the Merit Systems Protection Board, early this year.

The results of this survey are reported in, "Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?" by the Merit Systems Protection Board, April, 1981, copies of which are lodged with the Clerk of Court. The methodology was to send 13,000 questionnaires to randomly-selected federal employees at their home addresses. The number chosen from each Agency was in proportion to that Agency's relative size among government civil servants.

The first important result was the extremely high response. 8,600 survey forms were returned, which is much higher than the expected response rate from any type of mail survey. Also, the survey was extensive and detailed. The questionnaire is printed in the report. The very high response to a very detailed survey, suggests that the results obtained are reliable.

The key substantive findings were these: 45% of the respondents reported personal observations of "waste, fraud and mismanagement" in government during the past year. One in ten of those said the activity seen involved more than $100,000. Less than one in five of those reported what they had seen to any "responsible official or channel."

The three leading reasons given why the observers did not report what they had seen were: "Nothing would be done"—53%; "Nothing could be done"—20%; and "It was too great a risk for me"—19%. When asked what incentives would encourage observers to report what they had seen, the four leading answers were: "Knowing that something would be

done"—81%; "Knowing I would be protected against reprisals"—41%; "Knowing that the problem was serious"—36%; and "Knowing I could report it anonymously"—28%. The survey also breaks down the level and kinds of reprisals which have been taken during the past year, and the lack of confidence of employees that they will be protected if they make true but adverse reports about the operations of their offices. It also shows that the possibility of reports being made declines sharply beyond the level of the employee's immediate supervisor.

Respondent was not covered in his civilian job with the military by the Merit System Protection Board. So, this report does not concern him directly; however, the Taxpayers Fund submits that it clearly shows the extent of the problems of the misuse of government funds, of the failure to report it, and of the fear of reprisals, each of which will be directly affected for better or worse by the outcome of this case.

It was partly in response to the firing of the Respondent that Congress passed the Civil Service Reform Act of 1978 (5 U.S.C. § 2301, *et seq.*), known popularly as the Whistleblowers Act. As its provisions show, its purpose was to insulate government employees from retaliation for providing honest information on malfunctions of the government. Numerous hearings have been held subsequently on the effectiveness of the Act, one being before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service of the House of Representatives, March 4, 5, 6, and 12, 1980. Copies of the transcript of that have been lodged with the Clerk of Court.

To set the general framework of reports by government employees, and reprisals for such reports, Taxpayers Fund would draw the Court's attention to the Statement of the Government Accountability Project of the Institute for Policy Studies (at p. 53), the Statement of Senator Ribicoff, Chairman, Governmental Affairs Committee (at p. 181), and the Statement of the President-Elect of American Society for Public Administration. (p. 72).

These statements, and others throughout the testimony, all stress that the ability of the government to control and direct its spending, and therefore its accountability to the public for its choices and actions, are hampered to the degree that the elected leaders of the government, both the President and the Congress, cannot obtain full and accurate information about what the government is doing with its funds.

The "oversight responsibilities of Congress," to which Senator Ribicoff refers, are a shorthand for the appropriations duties of Congress, as set forth in the Constitution. Taxpayers Fund submits that these are the key to the instant case.

C. The Statutory Remedies Available to the Individual Are Not Complete, Even for Him. Even if They Were, They Offer No Effective Remedy for the Presidential and Congressional Interests Directly Involved, and the Public Interest Involved Indirectly.

The record reflects that the Respondent has been restored to his pay scale, and has received back pay, for being improperly terminated. Petitioners argue that this is full relief, and that none other should be allowed by the Court.

The first answer is that this is not full relief. In *Fitzgerald* v. *Hampton* (US DC, for DC, No. 76-1486, 3 March, 1981), the Court ruled that the Air Force had substantially diminished the duties and responsibilities of Respondent, and that the Civil Service Commission had not granted appropriate relief, despite instructions on prior remand.

The reasoning is straight forward. To high-level federal employees, the responsibilities and discretion they exercise in their positions are a major part of why they seek and hold such a position. Retaining a title, a salary, and an office, but losing those, is not a full remedy. For example, were it possible for a judge to be terminated wrongfully, and then reinstated, with all the prerogatives of his office except the opportunity to decide cases, it would be a fatally incomplete remedy.

But even if it was possible to fashion a complete reinstatement for a high-level civil servant, that would not be a total

remedy for him. There are harms to the individual, both personal and financial, which are not met. Still, the importance of this case goes far beyond the individual.

If this is the only remedy, absolutely nothing is done with respect to the individual(s) who caused the employee to be fired in the first instance. It is the taxpayers, not the superior officers, who provide the back pay. The superior officer is in a no-lose position, when contemplating a dismissal which he may know to be improper. If the termination is not reversed, the superior has gained his objective. If the termination is subsequently reversed, the superior has still gained his objective partially for the years that the employee was out of work, and the superior bears no part of the costs of reinstatement.

So the Court must address the choice between qualified or absolute immunity for a President both for the instant case, and for the inevitable future cases. In deciding the present case, however, the Court should consider the effect of its decision on the Constitutional powers of the Congress. The most recent case with precedential[3] value, bearing on the present case, is *Butz* v. *Economou,* 438 US 478 (1978). The majority in *Butz* found that a Cabinet-level official is entitled to only qualified immunity, and stated the standard as "good faith and reasonable grounds." (*Butz* at page 485.) It restated the "general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." (*Butz,* at page 490.) It rejected in a single paragraph the claim of absolute immunity for the federal officials sued in the case.

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[3] The case of *Halperin* v. *Kissinger,* 606 F. 2d 1192 (D.C. Cir., 1979), *aff'd by equally divided Court,* No. 79-880, 22 June 1981, offers no precedent because of the equal vote. It is also distinguishable from the instant case on two grounds. National security was a major issue in *Halperin,* and is not present here. The interests of Congress are at issue here, and were not present in *Halperin.*

However, there was a strong and outspoken dissent in *Butz*. The dissent recognized as a practical matter that substantial sums are at stake in government decision-making, and that the higher the level of the official, the broader the decision, and the greater the sums involved. It recognized that both businesses and individuals having large financial interests in the outcomes of such decisions might be tempted to file suits against the federal officials involved, on the basis that sometimes the only defense is a good offense. The dissent also recognized the impediments which the bringing of such suits would place on the Defendants in continuing to exercise the functions of their offices. (*Butz*, at pps. 521 and 527.)

Following the practical analysis one step further, suits brought as a counter-attack with the real purpose of affecting the outcome of pending governmental decisions against the Plaintiff in such a case are absolutely useless unless filed promptly. Also, civil suit would cause no impediment to official functions if mandatorily delayed until after the officials had left office.

If the issue is between allowing a President to be forced through civil trial while in office, or preventing that, there may be an unbridgeable gap between the majority and the dissent in *Butz*. But if the choice is one of requiring a *former* President to go through a civil trial, then there is a possible common ground. The instant case fully illustrates the distinction. (This is further discussed in Section II, below.)

D. Qualified Immunity Was Clearly Contemplated by the Framers Concerning Constitutional Violations by The President. This is Consistent with This Court's Decisions in *Butz* and *Scheuer*.

The Petitioners draw two analogies in urging that absolute immunity be allowed to them. One is to the Speech and Debate Clause of the Constitution concerning members of Congress; the other is to the line of cases, applied in part in *Butz*, providing absolute immunity to judicial and prosecutorial officers, and to quasi-judicial officers. Neither is applicable to the President.

The Constitution in terms mentions and grants absolute immunity only to members of Congress, and only in certain specified areas. The fact of this narrow and defined grant demonstrates that the Framers understood the concept and use of absolute immunity, and chose to apply it in that circumstance. Its presence there, and its absence elsewhere, suggest that the Framers made a deliberate choice. (See *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967).)

As the supreme law, the Constitution is capable of allowing a benefit in one area and not in others, though logically the two might seem similar. In *Baker* v. *Carr,* 389 US 186 (1962), this Court recognized that the "one man, one vote" rule applied through the 14th Amendment to all of the state legislatures, but did not apply to the Senate of the United States, because the Constitution expressly provided a different method for election of that body. As a matter of political logic, one man, one vote, is just as important for the election of a U.S. Senator as for any other official. But under the Constitution it does not apply in the former context. Therefore the Constitution is under no requirement from any source to extend to the President the kind of immunity it gives to Congress.

Regarding the absolute immunity granted to judicial and quasi-judicial officers, the Petitioners discuss it as if it were a matter of high visibility, or importance of issues being decided, or number of potential adversaries who might be aggrieved by the decision made. It is not based on those factors.

If these were the determining factors, then the Governor of Ohio or any other state would rank far higher on each of them, than inferior court judges in the federal, state and local systems. Yet the law is clear that the former possesses only qualified immunity (*Scheuer* v. *Rhodes,* 416 US 232 (1974)), while the latter possesses absolute immunity (*Pierson* v. *Ray,* 386 US 547 (1967)).

In a statement which the briefs so far filed have missed, the Framers stated their belief that the subsequent liability of a President after leaving office, would be as much, including civil liability, as a former Governor. "In this delicate and important

circumstance of personal liability, the President of Confederated America would stand on no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware." (*Federalist*, # 69.)

For common law immunity, it is the nature of the decision-making being done, namely judicial, which is the critical factor. And the President is not a judicial or quasi-judicial officer. Quite the contrary. The judicial power of the United States is vested by the Constitution in this Court and in such inferior Courts as the Congress may from time to time ordain and establish. (See Art. III, generally.)

Using this authority, Congress has enacted numerous laws creating both inferior Courts, and various forms of administrative judges and prosecutors, which this Court has termed quasi-judicial offices, and to which it extended absolute immunity in *Butz*. The cases are entirely consistent that the basis of this particular absolute immunity is in the common law, pre-existing the establishment of the government of the United States.

The President is not a congressional officer, entitled to the benefits of the Speech and Debate Clause. He also does not hold an office known to the common law. Therefore, both of the analogies which are drawn by the Petitioners are inapposite. If this Court is to grant absolute immunity to Presidents, it must do so for reasons having to do with that office, and not those having to do with offices in the other two co-equal branches of the government.

While few may doubt that it is in the nation's interest that all Presidents be "vigorous and fearless" in the performance of their duties, it reverses the Constitutional framework to suggest that it requires absolute immunity for the President, when his choice of action is to violate the Constitution itself. This is important when the Constitutional right violated is only that of an individual citizen, whether employee of the government or not. It is especially important when the violation of the individual's right is also an attack on the Constitutional powers of another branch of government, in this case the Congress.

In the First Amendment cases, the Court has long recognized the "chilling effect" on others of the diminution of one person's rights. This case represents a special application of that idea. The power of Congress both to raise taxes and to appropriate and spend the funds raised, is directly and seriously affected by the chilling effect of a decision against the Respondent in the instant case.

As part of their argument that a President requires absolute immunity, Petitioners note that Congress has delegated to the President, or to officials and agencies under his supervision and control, a host of functions, with the result that the President now directs an enormous federal bureaucracy that fundamentally affects every citizen. What is missing from that argument is that Congress has a Constitutional duty to oversee the spending of the money that supports that bureaucracy, a function which cannot be properly carried out if the President can interfere with the receipt of full and accurate information by Congress from members of that bureaucracy.

Even by the standards of present federal budgets, $2 billion is a serious amount of money. An unknown and unauthorized expenditure of such an amount is a serious concern to Congress. Therefore, suppression of receipt of such information in the future is a major concern to Congress in the exercise of the appropriations powers.

Petitioners also argue that the rare instances of successful civil suits against a President militate in favor of absolute immunity. If the competing interests in such cases were solely those of a President versus a private citizen, this argument might have some weight. But as the instant case demonstrates, there are circumstances in which the competing interests are those of the President and the Congress, with the individual being the focal point of the fight between these two branches of government. When the powers of Congress are clearly though indirectly at stake, there cannot be a presumption that the President is more important than the Congress. Therefore, this argument, whether or not it might be valid in other cases, has no application here.

Petitioners also argue that discovery in a civil suit such as this may threaten the integrity of the office of President. Again, the argument is incomplete. It does not admit of the possibility that the actions of a President himself may threaten the integrity of his office, and that impeachment, or criminal, or civil proceedings may be necessary to vindicate the integrity of the office.

Petitioners base much of the rationale for absolute immunity on the negative influence of civil damage liability on responsible decision-making. This ignores the fact that when the powers of Congress are involved, as here, such civil liability may have a positive influence, and it may be its absence that has a negative influence.

Petitioners argue that the checks and balances among co-equal branches of government are an essential part of our system of government, and offer this as a reason why the courts should not interfere with the President. Missing from this argument is the point that Congress cannot be co-equal, if its sources of information concerning whether its appropriations laws are being carried out can be curtailed by actions of the President. If those sources can be so curtailed, what effect does this have on the power of Congress, one of the two co-equal branches with the Executive?

The final argument of the Petitioners is that the absence of civil suits against a President for almost two hundred years suggests a conclusion that there is no such right. Rather than a recognition that the remedy did not exist, the lack of civil suits against Presidents until recently may only reflect the relative growth of the Executive Branch, both in numbers of employees and in billions of dollars being spent, a process that did not begin in earnest until the 1930's, and only became comparable in size to its present levels in the last two decades. It could also reflect that fact, coupled with a difference between Presidents.

There is a strong public policy underlying the immunity for which Petitioners argue. The policy is that the discretion of the President in a thousand matters is part of the purpose for which he is elected. As Edmund Burke said, "Your representative

owes you, not his industry only, but his judgment . . ." (Speech to the Electors of Bristol, 2 Nov. 1774.)

But a rule based on public policy can extend no farther than the policy underlying it. If Presidential discretion means any choice between alternatives which the President voluntarily makes, then there are no limits to the policy and no limits to the rule. But it also means that the President may choose to commit acts or make choices which are illegal or unconstitutional.

On the other hand, if Presidential discretion means choices exercised pursuant to powers granted to the President by the Constitution, or by Congress acting pursuant to the Constitution, then both the policy and the rule must be qualified.

Taxpayers Fund submits that the instant case demonstrates why both the policy and the rule are necessarily limited. The Constitution is careful to define the few instances in which any of the three branches of government can directly effect the operations of either of the others. Congress can impeach either a President or a Judge. The President can veto an act of Congress. The Court can declare unconstitutional acts of Congress or actions taken by the President, and so forth. The care with which the Framers define each of these, and the reasons they gave for each in the *Federalist*, lead to the conclusion that no interference by one branch in the activities of another was to be implied or permitted, other than those expressly stated.

If this is so, then the President has a right to suggest to Congress what legislation, including appropriations, it should consider (Art. II, § 3, first phrase), but he does not have any right to prevent Congress from carrying out its duties in appropriations, including receiving accurate information from government employees. The latter function is "necessary and proper" to Congress.

If interference with Congressional testimony is viewed as a direct attack by the President on the Constitutional powers of Congress, then the public policy does not give him discretion in that area. And if he has no discretion to protect in a case such

as this, he requires no immunity to protect it. The President actually has an affirmative duty to see that such information from the Executive Branch is provided as Congress may seek. The giving of such testimony is a Constitutional right of the witness under the First Amendment, and the receipt of it is a Constitutional right of Congress under Article I, §§ 7, 8 and 9.

It is noteworthy that the Framers specified in the Constitution the oath which the President should take, but were silent concerning oaths of Senators, Representatives, and Judges. By that oath, the President commits himself, "... to the best of my Ability, [to] preserve, protect and defend the Constitution of the United States." It is by custom, not requirement, that the same oath is taken by some other federal officials. Its mandate solely for the President supports the argument that the plenary discretion generally given the President did not include the discretion to violate the Constitution deliberately.

In the *Federalist,* the Framers devote two chapters to the necessity for the President to possess the "energy" to carry out his office. That word is their equivalent of the "vigorous and fearless" performance to which the Petitioners refer. Yet throughout that discussion the Framers make clear that the Executive, like the other two branches, is expected to remain within the Constitutional limits of his power. To the Framers, general discretion did not include the discretion to violate the Constitution. (See *Federalist,* ## 70, 71.)

II. THERE ARE STATUTORY OR COMMON LAW MEANS TO MINIMIZE THE PERCEIVED HARM FROM A CONCLUSION OF QUALIFIED IMMUNITY.

It is not uncommon for courts, when deciding cases of first impression, to note the potential problems which may arise from the decision being made, and to suggest that the legislature may choose by statute to avoid such consequences. It is only common sense for a court to do this, and both this Court and the highest courts of the several States have occasionally done so.

The majority in *Butz* notes that it was acting in an area where Congress had not spoken through any enactment. The dissent in *Butz* noted all of the problems which the bringing of such a civil suit against an official while he was in office would raise, the same problems which apply here, only with greater urgency where the Defendant might be a sitting President. Read together, the majority and the dissent in *Butz* offer the solution to the problem.

One Petitioner raises the possibility of actions such as the present one being delayed until after a President has left office. In fact, that occurred in this case. All of the Petitioners had become again private citizens when they were brought into this case as Defendants. In this case it was a matter of happenstance, in that the Respondent did not find out about the tape recordings which suggested the involvement of the Petitioners until after they had left office.

To the extent that Petitioners arguments are concerned with the disruption of the activities of a President or his advisors if sued while in office, there is a simple, statutory answer. In suits brought in federal court, if there is a federal Statute of Limitations, it governs. If there is no federal limitation on that particular action, then the applicable state limitation governs. Therefore, it would be possible for Congress in its discretion to establish a special Statute of Limitations for civil cases such as the instant one, which would prevent them from being brought until after the President who is allegedly involved, has left office, or alternatively to require an automatic stay for trial and/or discovery (but allowing preservation of evidence if required), for suits brought while a President is in office.

If this Court determines that a President has qualified immunity, and if Congress enacts such a law, citing as its reasons the ones discussed by the dissent in *Butz*, such a law would probably be found Constitutional. Both the interference with a sitting President, and the possibility of strike suits as counter-attacks against government decision-making would be restricted, if not eliminated, by such a statute.

That actually happened in the present case. The termination of the Respondent had long since taken place. The President was out of office. The genuine drawbacks which the dissent in *Butz* saw in such civil cases generally, did not occur or apply in the instant case. The prevention of these problems in future cases could be accomplished either by statute, as discussed above, or possibly by judicial decision. Should this Court be satisfied that the intention of the Framers was that no process, civil or criminal, should reach a President while he remains in office, it could so rule, and achieve the same result.

Finally, although the Petitioners argue that the Framers had in mind a total civil immunity for the President, the language of the Framers suggests otherwise. It was their clear intention that a President be liable for, "forfeiture of life and estate by subsequent prosecution in the common course of law." (*Federalist*, # 77.)

In addition to the statement quoted on page 14, wherein the Framers equate the subsequent liability of a President to that of Governors, this clear statement about subsequent criminal liability also leads to the conclusion that some civil liability would lie against a President after he was out of office. Since the Framers did not think that the possibility of a death penalty or loss of entire estate from criminal prosecution of a former President would prevent him from proper exercise of the duties and "energy" of his office, it follows that they would not consider the lesser harm of only partial financial loss to be such an impediment.[4]

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[4] Two final points presented by one Petitioner are that the discretionary decisions of hundreds of overworked district judges are an inadequate protection of a President prior to leaving office. This may be true, but it can readily be solved by statute as discussed above. Also, the Petitioner argues that the passage of time resulting in dimmed memories and the loss of evidence works against a Defendant. This is simply not true.

The burden of proof is on the Plaintiff. Especially with the extensive qualifications which *Butz* places on the right to bring such a civil suit, the loss of evidence by passage of time works severely against the Plaintiff.

CONCLUSION

Qualified immunity should be the standard concerning a civil suit against a President for violation of Constitutional rights, since that is all the protection which the President requires under the Constitution and all that he is entitled to. This is particularly true in a case such as the present one where the grant of absolute immunity would cause direct and serious harm to the Constitutional powers of the Congress, and indirectly to the taxpayers and the general public.

A determination that the standard should be qualified immunity does raise genuine and serious practical problems. But those can be largely or wholly resolved by statutory or common law limitations on the right, which can be established by Congress, or by this Court.

The proper conduct of the public business compels qualified immunity in this case.

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